

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH P.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-684

THE STATE OF CALIFORNIA,

Petitioner,

v.

BILL GREENWOOD and DYANNE VAN HOUTEN,

Respondents.

On Writ of Certiorari to the
Court of Appeal of California
Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL IAN GAREY
Attorney at Law
611 Civic Center Drive West
Penthouse Suite, 4th Floor
Santa Ana, California 92701
(714) 834-1950

Attorney for Respondent
Bill Greenwood

10042

1.

QUESTIONS PRESENTED

1.

IS A FEDERAL QUESTION SQUARELY PRESENTED.

TABLE OF CONTENTS

QUESTIONS PRESENTED	1.
TABLE OF THORITIES	111.
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
REASONS WHY THE PETITION SHOULD BE DENIED	2

1.

A FEDERAL QUESTION IS NOT SQUARELY PRESENTED.

.	2-5
CONCLUSION	5
DECLARATION OF SERVICE	6

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Fourth Amendment	2,4,5
<u>Bolen v. State</u> (Tenn. 1976) 544 S.W.2d 918, 920	5
<u>In re Lance, W.</u> (1985) 37 Cal.3d 873, 884	5
<u>Mason v. United States</u> 719 F.2d 1485, (10th Cir. 1983)	3
<u>Miller v. United States</u> 357 U.S. 310, 305, 2 L.Ed.2d 1332, 1336 78 S.Ct. 1190 (1958)	3
<u>Oliver v. United States</u> (1984) 466 U.S. 170, 177-178 [40 L.Ed.2d 214, 223, 104 S.Ct. 1735]	2
<u>People v. Krivda</u> (1973) 8 Cal.3d 623, 624	4
<u>People v. Krivda</u> (1971) 5 Cal.3d 357	4
<u>State v. Tanaka</u> (Haw. 1985) 701 P.2d 1274, 1276	4
<u>United States v. Jarabek</u> 726 F.2d 889, 900 (1st Cir. 1984)	4
<u>United States v. Manfredi</u> , 488 F.2d 586, 598 (2nd Cir. 1973) . . .	4
<u>United States v. McNulty</u> 729 F.2d 1243, 1251 (10th Cir. 1983) . .	3
<u>United States v. Mitchell</u> , 763 F.2d 971, 973-974 (10th Cir. 1983)	3
<u>United States v. Rickos</u> 737 F.2d 360 (3rd Cir. 1984)	3
<u>United States v. Watson</u> 423 U.S. 411, 420 fn. 8, 46 L.Ed.2d 598, 607, 96 S.Ct. 820	3

Respondent, Bill Greendwood, respectfully requests this Court deny the Petition for Certiorari, seeking review of the decision of the Court of Appeal of California, Fourth Appellate District, Division Three in this matter, decided June 23, 1986. The opinion is reported at 182 Cal.App.3d 729.

STATEMENT OF THE CASE

Respondent Greenwood adopts Petitioner's Statement of the Case. (See Petition for Writ of Certiorari, pp. 2-3.)

STATEMENT OF FACTS

Respondent Greenwood adopts the facts contained in the Opinion of the Court of Appeals.

REASONS WHY THE PETITION SHOULD BE DENIED.

1.

A FEDERAL QUESTION IS NOT SQUARELY PRESENTED.

The question of whether or not a warrantless search of trash receptacles left at curbside for collection mandates suppression of evidence under the Fourth Amendment would appear to turn on the question of whether or not the citizen has a reasonable expectation of privacy in the contents. As will be noted, infra, in the peculiar text herein involved, that issue must itself be determined almost wholly as a matter of state law.

The exclusionary rule of the Fourth Amendment is held to apply in those instances wherein there has been a violation of a constitutionally protected reasonable expectation of privacy. As this Court recently observed in Oliver v. United States (1984) 466 U.S. 170, 177-178 [80 L.Ed.2d 214, 223, 104 S.Ct. 1735]:

This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." Id., at 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" Id., at 361, 19 L.Ed.2d 576, 88 S.Ct. 507. See also Smith v. Maryland, 442 U.S. 735, 740-741, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

* * *

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See Rakas v. Illinois, 439 U.S. 128, 152-153, 58 L.Ed.2d 387, 99 S.Ct. 421.

(1978) (Powell, J., concurring).

There is substantial precedent that in determining the validity of an arrest or search, Fourth Amendment analysis requires reference to state law.

Thus, although in part commanded by act of Congress, this Court noted in the case of U.S. v. Di Re, 332 U.S. 581, 589 [68 S.Ct. 222, 226, 92 L.Ed. 210 (1948)]:

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

(In accord, Miller v. United States 357 U.S. 310, 305, 2 L.Ed.2d 1332, 1336 78 S.Ct. 1190 (1958); U.S. v. Watson, 423 U.S. 411, 420 fn. 8, 46 L.Ed.2d 598, 607, 96 S.Ct. 820.)

Federal circuit decisions do not appear unanimous on this issue, and its resolution would appear to depend largely on the particular context involved. As noted in U.S. v. McNulty 729 F.2d 1243, 1251 (10th Cir. 1983):

We do not say that federal courts need never construe or apply state law. Where the circumstances dictate the propriety of applying state law, it will be recognized. An example of this United States v. Dudek, 530 F.2d at 690. The failure of Ohio police officers to file a timely report and a verified inventory was held (in Dudek) to not require violation of an otherwise validly executed search warrant issued under Ohio law. A dearth of federal law on the issue in question is one such constraint. United States v. Di Re, 332 U.S. 581, 589-91, 68 S.Ct. 222, 226-27, 92 L.Ed. 210 (1948). In that case, the Court ruled that state law governed the propriety of seizure of evidence of a federal crime by a state officer working with a federal officer, because there was insufficient federal law on the question of warrantless arrest. More to the point here, a relevant federal statute may prescribe reference to state law in certain instances. Cf. Fed.R.Evid. 501 (privilege in certain actions to be determined in accordance with state law). Thus a careful examination of Title III, the federal wiretap statute, is necessary here. (Fn. omitted.)

(See also, U.S. v. Mitchell, 783 F.2d. 971, 973-974, (10th Cir. 1983) holding Federal Law controlling; cf. Mason v. United States 719 F.2d 1485, (10th Cir 1983) referring to state law; U.S. v. Rickos 737 F.2d 360 (3rd Cir. 1984).)

And in a series of cases dealing with wiretap evidence some courts have relied on state law, since the issue involved the basic right of privacy, particularly when state officers act pursuant to a state warrant. As stated in U.S. v. Manfredi, 488 F.2d 586, 596 (2nd Cir. 1973):

In dealing with the question of the validity of the warrants themselves, clearly a question of law, it will be recalled that the Crodelle affidavit submitted to the state court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." (Fn. omitted.)

But this doctrine concededly is not without its limitations. As stated in U.S. v. Jarabek 726 F.2d 889, 900 (1st Cir. 1984):

Curreri involved a state investigation with the use of wiretap equipment authorized by a state court order. Federal officials became involved only after the wiretapping was completed. The analysis in this case, upon which appellants rely, must be read in the context of the court's observation that a stricter state statute regarding wiretap interception will be applied by a federal court only in the event electronic surveillance is conducted pursuant to a state court authorization. **Curreri** provides no support for appellant's claim.

We have found no federal case that has relied on state law in judging the admissibility of evidence of intercepted communications in any circumstances other than where the electronic surveillance was conducted pursuant to a state warrant or order. On the other hand, a number of cases stand for the proposition that in federal criminal trials, regardless of any violation of state law, the admissibility of wiretap evidence always is a question of federal law. E.g., **United States v. Butera**, 677 F.2d 1376, 1380 (11th Cir. 1982), **cert. denied**, U.S. (1983); **United States v. Horton**, 601 F.2d 319 323 (7th Cir.) **cert. denied**, 444 U.S. 937 (1979); **United States v. Melligan**, 573 F.2d 251, 253 (5th Cir. 1978); **United States v. Shafer**, 520 F.2d 1369, 1371-72 (3d Cir. 1975) (per curiam), **cert. denied**, 423 U.S. 1051 (1976). In the instant case it is not necessary for us to rest our decision upon this proposition, for here we have federal officers who performed their duties in a lawful manner in a joint investigation. The mere involvement of state officers is not sufficient reason to look to state law to determine the admissibility of interception evidence. (fn. omitted.)

The foregoing decisions provide ample analogous authority for reference to state law to determine certain basic issues of privacy.

And the warrantless trash searches involved in the present case what

is at first blush a general Fourth Amendment issue, but ultimately it is an issue which must rest on state law.

In People v. Krivda (1971) 5 Cal.3d 357, the California Supreme Court ruled that warrantless trash searches violate a reasonable expectation of privacy. In People v. Krivda (1973) 8 Cal.3d 623, 624, that Court ruled that its decision was based on both state and federal principles. California is not entirely alone on this issue, see, State v. Tanaka (Haw. 1985) 701 P.2d 1274, 1276; see also, Bolen v. State (Tenn. 1976) 544 S.W.2d 918, 920.)

More importantly, for purposes of the present analysis, a state citizen's reasonable expectation of privacy must be largely influenced by the peculiar facets of state law. State law is thus a circumstance which, viewed with other circumstances, determines the extent of privacy which a citizen might reasonably expect.

California has its own constitutionally protected right to be free from unreasonable searches and seizures (Cal. Const. Art I §13), and its own constitutional provisions protecting its citizens' right to privacy. (Cal. Const. Art I §1.)

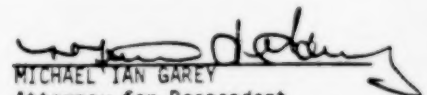
The adoption of Article I, §28(d) which eliminates the remedy of exclusion, does not by its terms alter these basic notions of privacy. (In re Lance W. (1985) 37 Cal.3d 873, 884.)

A citizen in California, thus has the right to expect that his privacy will not be invaded by violations of the state constitution, even though that constitution no longer provides a remedy of exclusion in a criminal proceeding. That expectation of privacy is reasonable, since it is embodied in the state constitution, and its

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,


MICHAEL IAN GAREY
Attorney for Respondent
Billy Greenwood

THE STATE OF

v.

BILLY GREENWO

STATE OF CALI

COUNTY OF ORA

I, ROSANA HUI
California.
action: my b
Suite, 4th Fl

On February 1
BRIEF IN OPPO
copy thereof
United States
addressed as

Attorney Gene
110 West "A"
San Diego, CA

Court of Appe
Fourth Appell
600 West Sant
Santa Ana, CA.

Further, that
-entitled act
hereinafter n

Cecil Hicks,
700 Civic Cen
Santa Ana, CA

I declare und
correct.

Executed on F

CALIFORNIA,
Petitioner,

et al.,
Respondents

DECLARATION OF SERVICE

CALIFORNIA)
) ss
E)

I, [Name], am employed in the county of Orange, State of California, am over the age of 18 and not a party to the within action. My business address is 611 Civic Center Drive West, Penthouse 1, Santa Ana, California 92701.

In 1987, I served the foregoing document described as [Document Description], in the above entitled action by depositing a sealed envelope, postage thereon fully prepaid, in the mail at Santa Ana, California. Said envelopes were as follows:

1111 Street, #600 92101	Richard Schwartzberg 401 Civic Center Drive West #820 Santa Ana, CA. 92701
-------------------------------	--

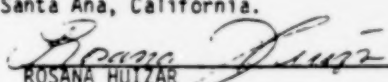
U.S. District Court Santa Ana Blvd. 92701	California Supreme Court 3580 Wilshire Blvd., Room 213 Los Angeles, CA. 90010
--	---

On the same date I personally served a copy of the above document by delivering by hand and leaving with the person named a copy thereof:

U.S. District Attorney 700 Civic Center Drive West 92701	Michael J. Pear, D.D.A. 700 Civic Center Drive West Santa Ana, CA. 92701
--	--

I declare under penalty of perjury that the foregoing is true and correct.

Witness my hand and seal this [Date] day of February 10, 1987, at Santa Ana, California.


ROSANA HUIZAR